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JAY R. AND TWILA M. DANIELS, )  
 )  
Appellants, ) DOCKET NO.: IT-2003-2  
 )  
-vs- )  
 )  
THE DEPARTMENT OF REVENUE ) FINDINGS OF FACT,  
OF THE STATE OF MONTANA, ) CONCLUSIONS OF LAW,  
 ) ORDER and OPPORTUNITY  
Respondent. ) FOR JUDICIAL REVIEW

After careful review of the Board's file on the appeal and good cause appearing, on April 11, 2003, the Board issued its order that the appeal would be decided on briefs submitted by counsel of record to the parties on a matter of law that would be determinative of the outcome of the appeal. A briefing schedule was set forth in the order with both parties submitting initial simultaneous briefs to be followed by simultaneous reply briefs. Upon filing of the reply briefs the appeal would be

deemed submitted for decision.

This briefing schedule was complied with by Charlena Toro, counsel for DOR, Respondent, and Ryan C. Rusche, counsel for Jay R. and Twila M. Daniels, Appellants, through their timely submission of briefs which were of great help to the Board in resolving this appeal. Subsequent to satisfaction of the briefing schedule, counsel for the DOR filed, on June 18, 2003, DOR'S NOTICE OF SUBSEQUENT AUTHORITY which was not replied to by Appellants' counsel. Accordingly, the Board being well and fully informed in the premises, finds, concludes, and orders as follows:

#### **STATEMENT OF THE ISSUE**

As set forth in the order and briefing schedule to the DOR and the Appellants the issue is:

May the State of Montana impose and collect income taxes on income earned on a tribal reservation in Montana by a member of an Indian tribe located in an out-of-state Indian tribe reservation?

#### **FINDINGS OF FACT**

- (1.) Appellants filed an appeal with the DOR in June, 2002. A DOR Claims Resolution official denied Appellants' request and forwarded the appeal to the DOR's Hearing Examiner for final agency review in September, 2002. On a motion by the DOR and over Appellants' objection, the Hearing Examiner continued the proceedings from November 19,

2002, until December 10, 2002, while a petition for certiorari was pending before the United States Supreme Court in Montana Dept. of Rev. v. Flat Center Farms, Inc. 123 S.Ct. 662(Mem.)(2002). After the DOR's Petition for Certiorari was denied by the United States Supreme Court, a telephonic scheduling conference was held by the Hearing Examiner on January 6, 2003. During the conference, the parties made a joint motion to move the proceedings to this Board. The motion was granted in the Hearing Examiner's Order, dated January 7, 2003, directing Appellants to file a complaint with the Board within thirty days. Daniels filed a complaint with this Board on February 3, 2003.

(2.) A timely complaint was filed with the Board by the Appellants which was followed by a timely answer filed by the DOR. Subsequent thereto, on April 11, 2003, the Board ordered that the matter would be decided on briefs of the parties, submitted on a matter of law that would be dispositive of the appeal, and ordered a briefing schedule which was complied with by the parties.

(3.) Appellant Jay R. Daniels filed his sworn testimony by affidavit attached to Appellants' initial brief. The affidavit reads, in part, as follows:

1. I am an enrolled member of the Cherokee

Nation of Oklahoma, a federally-recognized Indian tribe, enrollment number C0044098. Verification of enrollment with the Cherokee Nation of Oklahoma is attached as Exhibit A to the Complaint filed in the above-entitled action.

2. I reside with my spouse, Twila Daniels, at P.O. Box 142, 409 13<sup>th</sup> Street East, Poplar, Montana, 59255, in a house owned by the Assiniboiné and Sioux Tribes of the Fort Peck Reservation, a federally-recognized Indian tribe. Said house is located on real property held in trust by the United State for the Assiniboiné and Sioux Tribes of the Fort Peck Reservation.
3. I am employed as an Indian Self-Determination Specialist at the Fort Peck Agency, by the Bureau of Indian Affairs, United States Department of Interior, in Poplar, Montana, within the exterior boundaries of the Fort Peck Reservation. The Fort Peck Agency is located in a building owned by the Assiniboiné and Sioux Tribes of the Fort Peck Reservation on real property held in trust by the United States for the Assiniboiné and Sioux Tribes.
4. My spouse, Twilia Daniels, is an enrolled member of the Assiniboiné and Sioux Tribes of the Fort Peck Reservation, a federally recognized India tribe, enrollment number 206U09338. Verification of enrollment is attached as Exhibit B to the Complaint filed in the above-entitled action.

#### **TAXPAYERS' CONTENTIONS**

Appellants Jay R. and Twila Daniels contend that this appeal is controlled by and must be decided under LaRoque v. State of Montana, 178 Mont. 315, 538 P2d. 1059(1978) as reaffirmed by Flat Center Farms, Inc. v. State of Montana, Dept.

of Rev. 310 Mont. 206 (2002), Cert. Denied by Montana Dept. of Rev. v. Flat Center Farms, Inc. 123 S. Ct. 662 (Mem.)(2002). Appellants assert that, in LaRoque, the Court held in 1978 that Montana may not collect or impose taxes on an Indian earning income on a reservation regardless of whether he is an enrolled member of the tribe on whose reservation he is living. APPELLANTS' BRIEF at 1-2. From 1978 through 1993, income earned on the reservation by Appellant Jay R. Daniels was not taxed pursuant to A.R.M. 42.15.121(1), as then in effect. However, that section was amended effective for 1994 and subsequent years to read:

An enrolled tribal member who resides on an Indian reservation and is an enrolled member of a tribe which resides on that reservation is not taxable with respect to income derived from sources within the exterior boundaries of that Indian reservation...

APPELLANTS' BRIEF at 2-3.

Appellants contend that the amended A.R.M. 42.15.121(1) under which the DOR has been collecting taxes from Appellants beginning in 1994 unlawfully alters LaRoque without proper legislative authority for expanding the State's jurisdiction concerning taxation of Indians. This is particularly valid, Appellants argue, in light of their assessment that Flat Center reaffirms LaRoque. Thus, Appellants argue A.R.M. 42.15.121(1) was invalid from the date of its adoption and all taxes paid by

Appellants from 1994 should be returned by the DOR.

In summary, the Appellants contend that Montana Supreme Court authority both before (LaRoque)(1978) and after (Flat Center (2002) authority submitted by the DOR controls the issue and decision on this appeal and, under such authority, Appellants must prevail.

#### **DOR'S CONTENTIONS**

DOR contends that LaRoque and Flat Center are not controlling on this appeal and that Washington v. Confederated Tribes of the Colville Indian Reservation 447 U.S. 134(1980) and Duro v. Reina 495 U.S. 676 (1990) are the controlling decisions.

In Colville, the United States Supreme Court upheld the imposition of a state cigarette and sales tax on Indians residing on a reservation but not enrolled in the governing tribe. DOR BRIEF at 5. In Colville the Court found that: "For most practical purposes those Indians [not enrolled in the governing tribe] stand on the same footing as non-Indians resident on the reservation." Colville, 447 U.S. at 160-61, DOR BRIEF at 5. Thus, in the appeal at issue, Appellant Jay R. Daniels would be on the same footing as a non-Indian and therefore subject to tax on his income. In Duro the Court re-examined Colville and explained that: "Exemption from state taxation for residents of a reservation, for example, is determined by tribal membership, not by reference as a general

class." Duro 495 U.S. at 68-87, DOR BRIEF at 5. Therefore, under these two cases, the Appellant, Jay R. Daniels, would be considered a "non-Indian" and his income taxed. The DOR contends that A.R.M. 45.15.121(1) in its 1994 language is correct and applicable to this appeal. In responding to a comment regarding the proposed rule change effective in 1994 the DOR stated: "[I]t is unlikely the Montana Court would reach the [LaRoque] conclusion in light of the United States Supreme Court's decisions in Colville, Duro..." DOR BRIEF at 15-16. DOR argues that, because Appellant Jay R. Daniels' income comes as a Federal government employee from the U.S. Treasury, albeit for services entirely performed on the reservation, it is not "derived from reservation sources" as required for tax exemption. DOR REPLY BRIEF at 10-11. DOR argues that, because Appellant Jay R. Daniels has appealed to the Board the DOR's individual income tax assessment in 2002, even if he prevailed on the merits of his appeal, he would be entitled only to refunds for tax years after the tax year 1997 under Sections 15-30-145 and 15-30-147 MCA. DOR BRIEF at 16-17. This is because of the 5-year statute of limitations, under those two MCA sections, for taxes appealed, argues the DOR. In its filing, DOR'S Notice of Subsequent Authority, submitted to the Board after completion of the ordered briefing schedule, the DOR contends that in Fitzgerald v. Racing Ass'n of Central Iowa,

decided June 9, 2003, the United States Supreme Court unanimously decided that legislators, not courts, had broad authority (within the bounds of rationality) to decide whom they wish to help with their tax laws and how much help those laws ought to provide. Taxation delineation is therefore a matter for legislative, rather than judicial consideration. SUBSEQUENT AUTHORITY BRIEF at 1-2.

In summary, DOR contends that United States Supreme Court decisions are controlling precedent and not distinguishable from the State cases and Colville and Duro are dispositive of this appeal. DOR contends that, in fact, Colville overrules LaRoque.

Further, the Appellants received non-exempt income from other than reservation sources, i.e. the Federal government. Additionally, even if the DOR does not prevail on the appeal, the Appellant is entitled only to a refund of income taxes for the years back to 1997. Finally, the DOR contends that the subject of taxation of incomes of Indians is a matter for the legislature, not the courts, to delineate.

#### **BOARD'S DISCUSSION**

The DOR seeks to have the Board, a State agency, overrule LaRoque (1978) based on a United States Supreme Court case, Colville (1980), when LaRoque was considered in a subsequent case, Flat Center (2002) by the Montana Supreme Court, which



declined the opportunity to overrule LaRoque and substitute Colville as the law of the State. In Flat Center, the Montana Supreme Court discussed LaRoque at page 211. The Court stated:

"Furthermore, we have considered whether tribal membership is critical to a determination of whether the State can tax income earned by Indians on tribal land." The Court then cited LaRoque as holding that tribal membership was not determinative. On page 212 of Flat Center, the Court stated: "In fact, we have in the past given greater weight to the situs of taxable income than the status of the income earner. That was the point of our holding in LaRoque." The Court further stated on page 212:

"...individual income earned by an Indian person derived wholly from reservation sources is exempt from state income taxes" (Emphasis Supplied). On page 213 of Flat Center, the Court stated: "The State suggests that subsequent Supreme Court decisions have undercut the logic of LaRoque and that non-member Indians are the equivalent of non-Indians for purposes of state taxation. We disagree ... and conclude that tribal status of an individual or corporation to be taxed may be relevant, but it is by no means dispositive" (Emphasis supplied). Colville was referred to in the majority opinion in Flat Center at page 210.

There, the Court stated: "That is not to say that state taxation is precluded in every instance. There is ample federal authority to the contrary. See, e.g., [Colville]." Thus, the

only conclusion is that the Montana Supreme Court was aware of Colville but declined to make it the law of Montana which the Board, as a State agency, must follow. Montana cannot impose a tax on Indians more onerous than imposed under Federal law. Because of LaRoque, Montana taxes Indians less than it would under Federal law as applied under Colville and therefore Montana taxes Indians within the parameters of Federal law. While Appellant Jay R. Daniels is a Federal government employee in the Bureau of Indian Affairs, one hundred percent of his income is derived from "wholly reservation sources" and thus satisfies the test in LaRoque where that taxpayer was also a Federal government employee in the Bureau of Indian Affairs. APPELLANT'S REPLY BRIEF at 13. What the DOR predicted with regard to ARM 45.15.121(1), at the time it was amended, did not occur in Montana. LaRoque is, at least presently, the law of the State. Thus, that ARM, as amended effective in 1994, is invalid and has been since its adoption because it is arbitrary, capricious and unlawful. The Appellant, Jay R. Daniels, has been unlawfully taxed under the invalid rule since 1994 and is therefore entitled to a refund of taxes paid since that date. Sections 15-30-145, and 15-30-147, MCA, however, appear to limit any revision of taxes to a period within 5 years of the year in which a revision is claimed or applied for. Therefore, the Appellants may receive a refund of taxes paid only since 1997

because their application or claim for revision was filed for the tax year 2002. Finally, the legislature in Montana has not taken advantage of its opportunity since 1978 to overrule or modify LaRoque, leaving the law of the State to be the holding in that case.

#### **CONCLUSIONS OF LAW**

1. **Section 15-2-104 MCA, Employees - expenses - minutes - rules.** provides, in part, that the Board may make all needful rules for the orderly and methodical performance of its duties as a tax appeal board and for conducting hearings and other proceedings before it.
2. **Section 15-2-302, MCA. Direct appeal from department decision to state tax appeal board - hearing.** (2)(a) Except as provided in subsection (2)(b), the appeal is made by filing a complaint with the board within 30 days following receipt of notice of the department's final decision.
3. The Board shall give an administrative rule full effect unless the Board finds a rule arbitrary, capricious or otherwise unlawful. **Section 15-2-301(4), MCA.**
4. LaRoque v. State of Montana, 178 Mont. 315, 538 P2d. 1059 (1978), Flat Center Farms, Inc. v. State of Montana Department of Revenue, 310 Mont. 206, (2002) Cert. Denied

by Montana Department of Revenue v Flat Center Farms, Inc.  
123 S. Ct. 662 (Mem.)(2002), Washington v. Confederated  
Tribes of the Colville Indian Reservation 447 U.S. 134  
(1980), Duro v. Reina 495 U.S. 676 (1990) Fitzgerald v.  
Racing Association o Central Iowa (June 9, 2003).

5. The appeal of the Appellants is hereby granted with the exception of the applicability of the five-year statute of limitations on refunds and the decision of the DOR is reversed with the noted exception.

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**ORDER**

IT IS THEREFORE ORDERED by the State Tax Appeal Board of the State of Montana that the Appellants' taxes paid beginning in 1997 shall be refunded and ARM 42.15.121(1) is declared invalid.

Dated this 10th day of July, 2003.

BY ORDER OF THE  
STATE TAX APPEAL BOARD

\_\_\_\_\_  
GREGORY A. THORNQUIST, Chairman

( S E A L )

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JERE ANN NELSON, Member

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MICHAEL J. MULRONEY, Member

NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA. Judicial review may be obtained by filing a petition in district court within 60

days following the service of this Order.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 10th day of July, 2003 the foregoing Order of the Board was served on the parties hereto by depositing a copy thereof in the U.S. Mails, postage prepaid, addressed to the parties as follows:

Ryan C. Rusche  
P.O. Box 27  
Wolf Point, Montana 59201

Charlena Toro  
Office of Legal Affairs  
Department of Revenue  
Mitchell Building  
Helena, Montana 59620

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DONNA EUBANK  
Paralegal